In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1596

SIX FLAGS OVER GEORGIA, LTD., AND
GREAT SOUTHWEST ATLANTA CORP., PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30-31) is reported at 474 F. 2d 18. Its supplemental opinion denying rehearing (Pet. App. 32-33) is not yet reported. The findings of fact and conclusions of law of the district court (Pet. App. 19-26) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1973. A timely petition for rehearing *en banc* was denied on April 10, 1973 (Pet. App. 32-33). The petition for a writ of certiorari was filed on May 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below were correct in holding that the exemption provided in Section 13(a)(3) of the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*) for "any employee employed by an establishment which is [a seasonal] amusement or recreational establishment * * *" does not extend to year-round employees of an amusement park when such employees are engaged, not in the operation of the amusement park itself, but in the construction or reconstruction of park facilities, including new buildings, rides, towers, fences, signs, driveways, and parking lots.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, including its exemption for seasonal amusement or recreational establishments (29 U.S.C. 213(a)(3)), are set forth in the petition (Pet. 3) and in its Appendix B (Pet. App. 37).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act to enjoin petitioners, who own and operate an amusement park of "very substantial size" near Atlanta, Georgia (Pet. App. 30),[1] from violating the Act's overtime and record-

---

[1] As shown by the appendix in the court of appeals, which we have abbreviated as "A." and which we are lodging with the Clerk, petitioners' amusement park was built in 1966 and 1967 at a total construction cost of approximately 12 million dollars, and it entertains almost two million guests each year (A. 42). In 1968, 1969 and 1970, the park's receipts totalled $9,416,289, $10,784,702 and $13,219,204, respectively (A. 16). During the park season, petitioners employ more than 1,600 workers; it has 215 employees, including the 100 involved in this action, who work on a permanent year-round basis (Pet. App. 21).

keeping requirements and from continuing to withhold unpaid overtime compensation due to some 100 workers. The affected workers consist of mechanics, fiberglass men, electricians, carpenters, painters, plumbers, landscape men, general laborers, animation men, sound men, artists, sign painters and janitors (Pet. 6), who are employed on a year-round basis both in repairing and maintaining and in constructing and reconstructing the various park facilities, including new buildings, rides, towers, fences, driveways, parking lots, and the like (A. 42-43).

Petitioners paid overtime compensation as required by the Act to the employees in question for their work between Labor Day and the fifteenth of April when the park was either closed to the public or open only on weekends. However, petitioners did not do so during the period from April fifteenth through Labor Day, during which time the amusement park was open to the public either on a full-time or weekend basis. During that time the workers in question were paid time and one-half compensation only for work in excess of 50 hours per week, as called for by their collective bargaining agreement, and not for work in excess of 40 hours per week as required by the Act (A. 16-17, 42-43).

Petitioners denied liability for their failure to pay overtime compensation as prescribed by the Act while the park was open to the public, claiming that they were not required to observe the Act's standards during that period because of the exemption in Section 13(a)(3) for employees employed by a seasonal amusement or recreational establishment.

It was stipulated by the parties, and found by the trial court, that petitioners' amusement park has employees who are engaged in commerce, including employees

handling or otherwise working on goods which have been moved in or produced for commerce, and that the amusement park is thus part of a covered enterprise within the meaning of Section 3(s) of the Act (Pet. App. 20). Although the parties also agreed that petitioners' "Six Flags Over Georgia" park qualifies as an amusement or recreational establishment, and the trial court so found (*ibid.*), it rejected petitioners' interpretation of the statute (Pet. App. 24) and held that the seasonal amusement establishment exemption did not extend to amusement park employees when they engage in construction or reconstruction activities, since such activities "are not characteristic of amusement park operations" (Pet. App. 23). The court noted that Congress intended "to include within the coverage of the Act employees of construction contractors who build for themselves as well as for others" (Pet. App. 23) and held that "it makes no difference whether or not the employer characterizes himself as a construction contractor or not since it is the nature of the work performed which is controlling" (*ibid.*).[2]

In affirming, the court of appeals pointed out that "the exemption is not a subsidy accorded to an employer because of his principal activities" (Pet. App. 31), and agreed with the district court that construction work is not amusement park work within the meaning of the exemption (Pet. App. 33). "Nor," ruled the court, "does it make any difference that the employee is

[2] Although the primary duty of the employees in question is the repair and maintenance of existing park facilities, they also install new rides, rework old ones, put up new fences, build new structures and remodel or refurbish old ones (Pet. App. 22). A large part of this construction work is contracted out during the off season so as not to interfere with public enjoyment of the park (A. 17, 43; Pet. App. 22). Some of the construction and reconstruction work, however, is performed during the park season (A. 43; Pet. App. 22).

doing mixed work" (Pet. App. 31), since earlier decisions had settled that the performance of exempt and non-exempt work during the same workweek results in nonexemption (*ibid.*).

ARGUMENT

1. Ever since the Fair Labor Standards Amendments of 1961 extended the Act's new "enterprise" concept of coverage to construction employees, the courts have consistently held that such employees are entitled to the Act's protection.[3] The courts below correctly ruled that petitioners' mechanics, electricians, carpenters, painters, plumbers, and other similar employees should not be deprived of the benefits of the Act when engaged in construction or reconstruction activities, simply because their employer operates an amusement park which otherwise qualifies for the Section 13(a)(3) exemption. This interpretation effectuates the purpose of the exemption reflected in the legislative history.

The legislative background of the exemption indicates that it was intended only for employees of certain amusement establishments—"typically those operated by concessionaires at amusement parks and beaches" (H. Rep. No. 75, 87th Cong., 1st Sess., p. 10). There is no indication that the exemption was intended to apply to persons who are primarily construction workers. Accordingly, the courts below correctly held the exemption inapplicable to the employees in question on the basis of their finding that the kind of construction

---

[3] See, *e.g.*, *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198 (C.A. 6); *Childress* v. *Earl Whitley Enterprises, Inc.*, 388 F. 2d 742 (C.A. 4); *Wirtz* v. *Melos Construction Corp.*, 284 F. Supp. 717 (E.D. N.Y.), affirmed, 408 F. 2d 626 (C.A. 2); *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F. 2d 658 (C.A. 4); *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F. 2d 1296 (C.A. 5); *Shultz* v. *W. R. Hartin & Son, Inc.*, 428 F. 2d 186 (C.A. 4); *Shultz* v. *Louisiana Trailer Sales, Inc.*, 428 F. 2 61 (C.A. 5); *Hodgson* v. *Colonnades, Inc.*, 472 F. 2d 42 (C.A. 5).

activities performed by them "are not characteristic of amusement park operations or the activities of amusement park employees" (Pet. App. 23). This finding is supported, *inter alia,* by the stipulated fact that "[a] large portion of [the construction] work" involved in erecting new rides, new fences, new structures and the like for petitioners' amusement park "is contracted out * * * " (Pet. App. 22).

2. The holding below accords with the decisions construing other exemptions in the Act, similar to the Section 13(a)(3) exemption. In *Phillips Co.* v. *Walling,* 324 U.S. 490, this Court held that the "retail establishment" exemption did not apply to employees in a central office and warehouse devoted solely to serving the needs of the employer's chain of retail stores, pointing out that the duties performed there "are economically, functionally and physically like those of [an] independent wholesaler's employees who * * * are admittedly entitled to the benefits of the Act" (324 U.S. at 498). The same exemption was held in *Fred Wolferman, Inc.* v. *Gustafson,* 169 F. 2d 759 (C.A. 8), to be inapplicable to employees of a candy kitchen operated to supply the employer's retail outlets, since such an operation was not "a normal and recognized incident" of the exempted activity (169 F. 2d at 761-762).

To the same effect is *Hodgson* v. *Colonnades, Inc.,* 472 F. 2d 42 (C.A. 5), which is so similar to the instant case that petitioners feel compelled to challenge its correctness (Pet. 8). The court there held that the overtime exemption in Section 13(b)(8) of the Act for "any employee employed by an establishment which is a hotel * * * " does not apply to permanent employees of a hotel who are engaged in expanding and modernizing the hotel's facilities. The court reasoned that the work of the construction crew "had little if anything to do

with the daily operation of the hotel as a facility for the accommodation of guests," and ruled that the case was therefore governed by the established principles that the exemptions from the Act's protection are to be narrowly construed and must "not be extended to another business merely because the principal business of the employer is exempted" (472 F. 2d at 46-47). See also *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2), petition for certiorari dismissed on motion of counsel for petitioner, 329 U.S. 667, in which the employees in a trolley company's power plant were held not to be within the exemption for "any employee of a * * * local trolley or motor bus carrier."

3. Petitioners' reliance on paragraph 5 of the Administrator's original Interpretative Bulletin No. 6, dealing with the Section 13(a)(2) exemption as it read prior to its amendment in 1949 (Pet. 13-14), is misplaced. The Secretary's present interpretative position (29 CFR 779.308), cited with approval by the district court in the instant case (Pet. App. 25) and criticized by petitioners (Pet. 14), not only reflects a change in statutory language, but also gives effect to the various court decisions construing the Act's "establishment" and "employer" exemptions, including *Walling* v. *Connecticut Co., supra.*

4. Contrary to petitioners' assertion (Pet. 8), the courts below construed the exemption here in accordance with the standards announced by this Court. Under these standards, each of the Act's exemptions must be "narrowly construed" and not extended "to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392). Where, as here, the broadest literal reading of an exemp-

tion provision would create an unreasonable result, it is appropriate to construe the language of the exemption restrictively in accordance with the statutory purpose. See *Markham* v. *Cabell,* 326 U.S. 404, 409; *United States* v. *American Trucking Ass'ns.,* 310 U.S. 534; *Holy Trinity Church* v. *United States,* 143 U.S. 457.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
SYLVIA S. ELLISON,
Attorney,
Department of Labor.

JULY 1973.

DOL-1973-07